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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-754

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

BOOKER T. HILLERY, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—
Criminal Division,
DORIS H. MAIER,
Assistant Attorney General—Writs Section,
ROBERT R. GRANUCCI,
Deputy Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-1336,
Attorneys for Appellants.

RESPONSE NOT PRINTED

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JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Northern District of California, specially constituted pursuant to the provisions of Title 28, United States Code section 2284, entered on August 16, 1973, insofar as it grants the appellees' declaratory relief

and enjoins the enforcement of Section 415.071 of the California Department of Corrections Manual, promulgated on August 23, 1971, by appellant Raymond K. Procunier, Director of the California Department of Corrections. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.[1]

OPINION BELOW

The opinion of the district court filed August 16, 1973, is presently unreported. A copy of the opinion granting declaratory and injunctive relief is attached hereto as Appendix A.

JURISDICTION

This suit was brought by appellees for injunctive and declaratory relief under the authority of Title 42, United States Code section 1983, and Title 28, United States Code sections 1343(3), 1343(4) and 2201. Appellees asked the district court to declare that Section 415.071 of the California Department of

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[1]Appellants are Raymond K. Procunier, Director of the California Department of Corrections; Louis S. Nelson, Warden of the California State Prison at San Quentin; James W. L. Park, Associate Warden of the California State Prison at San Quentin; and Joseph R. O'Brien, Public Information Officer at the California State Prison at San Quentin.

Appellees are Booker T. Hillery, Jr., John Larry Spain, Bobby Bly and Michael Shane Guile, inmates of the California State Prison at San Quentin. The district court dismissed the claims of plaintiffs Eve Pell, Betty Segal and Paul Jacobs and appellants do not challenge that part of the district court's order.

Corrections Manual was in violation of the United States Constitution and to enjoin appellants from enforcing such provision.

The order of the district court was entered on August 16, 1973. Notice of appeal to this Court was filed in the district court on September 12, 1973. A copy of the notice of appeal is attached hereto as Appendix B.

The jurisdiction of the three-judge district court was established pursuant to the provisions of Title 28, United States Code section 2284. The jurisdiction of this Court to review the decision of such a specially constituted district court by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal: *Younger v. Gilmore,* 404 U.S. 15 (1971); *Zemel v. Rusk,* 381 U.S. 1 (1965).

STATE PROVISION INVOLVED

California Department of Corrections Manual Section 415.017:

"Press and other media interviews with specific individual inmates will not be permitted."

QUESTIONS PRESENTED

1. Whether the opinion of the district court is in conflict with the opinion of the United States Court of Appeals for the Ninth Circuit (*Seattle-Tacoma*

Newspaper Guild v. Parker, No. 72-2330, filed June 7, 1973, which is presently unreported, and a copy of which is attached hereto as Appendix C)?

2. Whether the district court properly determined that a prison administrative regulation, which limits but does not prohibit face-to-face access of inmates to the press and other media, can be constitutionally promulgated and sustained only where there is a "compelling interest" advanced by such regulation?

3. Whether the First Amendment entitles inmates to demand and conduct face-to-face interviews with the press and other media?

STATEMENT OF THE CASE

On November 8, 1971, appellee Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that appellants Procunier, Nelson and Park were denying him an interview with the editors of Earth Magazine. An order to show cause was issued by a single-judge district court and on January 13, 1972, appellants filed a return asserting that the complaint did not pray for equitable relief or state facts entitling appellee to such relief, did not allege exhaustion of administrative remedies and did not show a violation of a federal right, a prospect of irreparable harm or a likelihood of appellee prevailing on the merits. Upon hearing on the order to show cause, counsel was appointed for appellee Hillery and, on March 8, 1972, a first

amended complaint for damages and declaratory and injunctive relief was filed.

The amended complaint added as plaintiffs the appellees John Larry Spain, Bobby Bly and Michael Shane Guile and also Eve Pell, Betty Segal and Paul Jacobs and added as a defendant the appellant Joseph O'Brien. The new pleading alleged the original claim of appellee Hillery and further alleged that Eve Pell was a freelance author who had been denied a requested interview with appellee Spain, that Betty Segal was a newspaper reporter whose request to interview appellee Bly was disapproved and that Paul Jacobs was a television reporter who had unsuccessfully sought permission to interview appellee Guile. The complaint "sought to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel." The amended complaint made no specific reference to Section 415.071 of the California Department of Corrections Manual.

On April 6, 1972, appellants moved to dismiss the amended complaint and subsequently, both sides filed further points and authorities in support of their respective positions during the course of which Section 451.071 was brought to the court's attention. On September 29, 1972, the single-judge district court issued an opinion and order declaring Section 415.071 invalid as a violation of the First Amendment, permanently enjoined the enforcement thereof and directed appellants to submit a proposed new rule con-

sistent with the opinion. Appellants, on October 4, 1972, filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and appellees did not oppose the motion. Consequently, on November 1, 1972, the September 29 opinion and order were set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.[2]

The matter was heard before the three-judge district court on February 24, 1973. After the filing of additional memoranda by the American Civil Liberties Union, amicus curiae, and by appellants, the matter was submitted.

The opinion of August 16, 1973 (Appendix A, attached) sets forth the facts about which there is no significant dispute. The district court found that prior to the late 1960's interviews between prisoners and the press were relatively infrequent and resulted in little burden upon or danger to the institution. However, the number of requests for such interviews increased substantially, with the rise of discontent within the prisons and with the consequent arousal of public concern and curiosity. This generated administrative hardships and also produced "the phenomenon of the 'prison celebrity' or 'big wheel'—the prisoner who through his writings and media coverage gained a certain notoriety both outside and in-

[2]Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were approved by the single-judge court on February 8, 1973.

side the institution." The court further noted that the "influence of the 'celebrity' over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison."

The district court then discussed the events which triggered the publication of Section 415.071, namely, the "tragic events of August 21, 1971," during which three San Quentin staff members and two inmates were killed. The court found that these events were viewed by officials as the climax of mounting disciplinary problems partially caused by the prison's "liberal posture" or "laissez-faire policy" with respect to press interviews. Section 415.071 was implemented on August 23, 1971.

The opinion further recognized the fact that the Department's regulation did not in practice prohibit all interviews, but allowed media representatives to enter the prison and conduct random interviews in which inmates so selected could express themselves personally.

Section 415.071, the court found, did not violate any First Amendment rights of the press and, accordingly, the claims of plaintiffs Pell, Segal and Jacobs were dismissed.

At the same time, however, the district court concluded that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. While observing that written communications with the press were not restricted, the court reasoned that inmates may demand

face-to-face interviews as a constitutional right because prison authorities should have no objection to having inmates who are inarticulate, and with apparently uncorroborated stories, assisted by the press.

In striking contrast with the facts as set forth at the outset of the opinion, the district court found that there was no "compelling interest" for the regulation. Addressing itself to San Quentin Prison only, the court found that appellants had made an insufficient showing of administrative burden caused by inmate initiated interviews, had not established the validity of the "big wheel" phenomenon and had not proven any rehabilitative effect from Section 415.071.

The court found Section 415.071 "too drastic" a measure but observed that reasonable limitations as to time, place and manner of such interviews may be imposed and that if authorities have good cause to believe that a particular interview would pose a clear and present danger to prison security, it may be denied.

THE QUESTIONS ARE SUBSTANTIAL

The opinion of the district court expands the application of the First Amendment to a novel set of circumstances. State prisoners, lawfully confined, may now demand that their responsibile custodians permit them to engage directly in meetings with the press and other media and such face-to-face interviews cannot be prohibited unless the responsible custodians prove a "compelling interest" for doing so. Though alternative means of communication are available, the district court holds that California cannot deny spe-

cific, individual interviews of its inmates with the press when initiated by the inmates. The questions presented by this decision are of utmost importance to the continued administration of the California prison system and those of other states, and the rationale of the district court may be felt in other areas of prison management as well.

Appellants urge that this Court take jurisdiction of appellants' appeal, review the decision of the district court and resolve the important issues at stake.

ARGUMENT

I

THE NINTH CIRCUIT HAS RULED DIRECTLY CONTRARY TO THE DISTRICT COURT ON THE SAME ISSUE.

Seattle-Tacoma Newspaper Guild v. Parker, United States Court of Appeals for the Ninth Circuit, No. 72-2330, June 7, 1973 (Appendix C, attached), was a suit brought by the press to establish an alleged right, among others, to individual interviews with inmates in a federal prison. Certain inmates joined in this litigation claiming that the Bureau of Prisons' policy statement involved, which prohibited *all* individual interviews, violated their First Amendment rights.

The similarities between the *Seattle-Tacoma* case and the instant case are more than striking. The Bureau of Prisons' policy statement and the California Department of Corrections' regulation were generated by serious prison disorders in 1971 and both

resolutions represented the abandonment of practices giving inmates relatively unfettered access to the press.

According to the *Seattle-Tacoma* opinion, the affidavit of the Director of the Bureau of Prisons disclosed a management determination that disciplinary problems increased following interviews with the disruptive and non-cooperative prisoners who encouraged others to adopt their hostile approach, and the prisoners interviewed became celebrities or "big wheels" who were less subject to constructive rehabilitation. The affidavit of the Director of the California Department of Corrections, appellant Procunier, in the instant case, stressed the "very real need to prevent such inmates from gaining notoriety via news media because of their behavior" and urged the point that it was detrimental to the general operation of the institution and to the welfare of the individual himself to allow him to become a hero or public figure with his peers or the general public "by unusual attention from the news media." In another document,[3] appellant Procunier speaks of an inmate named George Jackson, one of those killed on August 21, 1971:

> "By Mr. Hannon [Assistant United States Attorney]:
>
> Q. So would you tell us, Mr. Procunier, about George Jackson, and what his history was in California?
>
> A. George Jackson was a relatively unknown outside the prison but well known inside the in-

[3]Appellants filed in the district court the transcript of Mr. Procunier's testimony in *The Washington Post Co. v. Kleindienst*, United States District Court for the District of Columbia, Civil Action No. 467-72.

stitution up until January 1969, when he was charged with the murder of—he, along with two others charged with the murder of a correctional officer at our California training facility at Soledad. Then from then on until August 21, the incident at San Quentin, in which he was killed, he became more and more notorious and as a result in part of our policy for allowing interviews with individual inmates by the press.

Q. What were the circumstances under which George Jackson was killed at San Quentin?

A. By a method—it is in trial now, so we do not know for sure, but a gun was smuggled into San Quentin to him and he attempted to escape and was killed in the escape attempt.

Q. Did he kill anybody in the effort to escape?

A. Yes.

Q. How many?

A. There were three people, three staff members killed and two inmates killed, and three staff members wounded in the circumstances surrounding the escape.

Q. All right. Now, prior to his death, did the press in California have access to George Jackson?

A. Yes.

Q. And what kind of access did they have?

A. Well, it was our policy at the time for accredited news media to hold individual interviews upon requests, and until we stopped that because of the burden of work and the problems we felt it was creating, he had access for a period of about six months there, almost unlimited access.

Q. During the six-month period, can you recall, Mr. Procunier, how many interviews did he have with the press?

A. From August of 1970 until June of 1971, we have recorded—and there may be many more —33 interviews with various media reporters.

Q. And were these interviews that Jackson had with the press over the six-month period published in the newspapers?

A. Yes, many of them.

Q. Then did the penal institutions in California have free access to newspapers?

A. With the exception of on rare occasions that some publications, issue-by-issue, but the answer, generally, is, yes to all what we call legitimate—

The Court: That is because of your policy. You could have stopped the papers from coming in, couldn't you?

The Witness: No.

The Court: You can't stop the newspapers?

The Witness: No, we have a section in our Penal Code, enacted three years ago, that we cannot stop anything coming in unless issue-by-issue it was determined, it is our determination that it is inciting riot or people to violence. Anything that goes through the mail, we must allow in.

The Court: Oh, yes, but if you felt that Jackson's comments to the press were creating internal difficulties, you could have censored that, couldn't you?

The Witness: It would have been impossible, sir, with the magnitude of the—

The Court: It would not have been administratively possible?

The Witness: Impossible, because the results of the interviews were in most all the publications that were coming in. They come in by the hundreds.

By Mr. Hannon:

Q. Now, what was the message, if you will, that George Jackson had that was being published in the press and being sent into your institutions, please?

A. I can't say specifically. Generally, it was our opinion, after reviewing this, that the message was to the dissident type of inmate to not cooperate was the way to bring about change and to cooperate was to perpetuate the system as he saw it; and it was destructive, in terms of management principles, a destructive message, in our opinion.

Q. What did the interviews, in your judgment, Mr. Procunier, do to the image of George Jackson? Do you have an opinion on that?

A. It magnified, in our opinion, a negative leadership role, influencing men throughout the department to adopt the same type of attitude.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplinary problems of the penal institutions in California with respect to inmates?

A. We felt very strongly that this was the case.

Q. Did you make a judgment, Mr. Procunier, as to what was the cause of the disciplinary problems that were now erupting?

A. Yes.

Q. What was the judgment?

A. The judgment was that the results of interviews with George Jackson and other inmates who had similar attitudes was a part of the increase in problems in the department."

The Ninth Circuit in *Seattle-Tacoma* recognized and emphasized that the Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison, the safety and rehabilitation of the inmates and must be given "wide discretion in formulating rules to govern prison life." The court concluded that the federal ban on interviews was a necessary and reasonable action within the scope of discretion given prison administrators and did not violate the prisoners' First Amendment rights. The same would seem to apply to the managers of a state prison as well.

After Mr. Procunier in his transcribed testimony explained the basis for his decision restricting press interviews with specific inmates, he elaborated on the practice under the new regulation, section 415.071:

> "The Court: I don't want to cut Mr. Hannon off, but I am sitting here trying to find out what you did about it. What are your rules now?
>
> The Witness: We have changed it now. The interview policy with the media is almost identical with the Federal requirements. The only change that we made is this: We will not allow an interview, a press interview or interview with the media at their request by specific name and number. We haven't changed the accessibility of the institution and talking to inmates.
>
> The Court: So, it is more or less like the Federal policy?
>
> The Witness: Almost identical to the Federal policy, with a few modifications. We changed from the open policy to what the Federals are doing now. We have some other changes, but they are minor.

By Mr. Hannon:

Q. The significant change is that the press is no longer allowed to interview prisoners, as such?

A. The significant change is that they still interview inmates. They interview or talk with them, or any way you want to put it, but they do not do it on their own initiative with specific inmates. I can expand on that, if you want me to, to make it clear."

The California regulation is certainly less restrictive than the federal policy. Consequently, the district court in the instant case should have followed the path of the Ninth Circuit. *See also Sostre v. McGinnis,* 442 F.2d 178, 179-200 (2d Cir. 1971) (en banc). The fact that it has set upon a different course has caused conflicting court opinions in the same jurisdiction and has produced different legal guidelines for state and federal penal institutions.

II

THE DISTRICT COURT APPLIED AN IMPROPER STANDARD IN DETERMINING THE VALIDITY OF THE PRISON REGULATION.

Restrictions on the extent and character of inmates' communication with the outside world are inherent incidents in the management of prisons and prisoners. Federal courts have formulated a variety of "standards" in determining whether or not a prison rule violates the First Amendment.

A few courts, such as the district court in the instant case, have demanded prison officials to demon-

strate a "compelling interest" for the rules they promulgate. *See Nelson v. Heyne*, 355 F. Supp. 451, 452-455 (N.D.Ind. 1973). Most courts, however, hold that the authorities must show that the regulation or practice is "reasonably and necessarily" related to the advancement of some justifiable purpose of imprisonment. *See Gray v. Creamer*, 465 F.2d 179, 186 (3rd Cir. 1972); *Corothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970). The United States Court of Appeals for the Ninth Circuit has adopted a "rational basis" test which, in effect, is a corollary of the "reasonable and necessary" standard followed by the majority of courts. *Seattle-Tacoma Newspaper Guild v. Parker*, No. 72-2330, June 7, 1973 (Appendix C, attached).

Lawful incarceration brings about the withdrawal of access to many means of communication, *e.g.*, the use of telephones and the unlimited access to visitors. Such personal or physical methods of relating the message to the media, in a prison setting, are not fundamental to the First Amendment. The "compelling interest" standard is too strict a test. While appellants do not concede that the reasons for implementing Section 415.071 fail even this standard, nevertheless it was not the proper guideline for the district court to follow.

III

APPELLANTS IN PROHIBITING INMATES FROM DEMANDING AND CONDUCTING PERSONAL AND INDIVIDUAL INTERVIEWS WITH THE PRESS DO NOT "ABRIDGE" THE FREE SPEECH OR OTHER FIRST AMENDMENT RIGHTS OF THOSE INMATES.

Inmates, of course, retain federal constitutional privileges and rights, but it is axiomatic that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). This undisputed principle is consistently applied by federal courts to uphold restrictions upon the communicative activities of prisoners which, if they were free men, would enjoy constitutional protection. *Stroud v. Swope*, 187 F.2d 850, 852 (9th Cir. 1961), *cert. denied*, 342 U.S. 829 (outside publishing business); *Numer v. Miller*, 165 F.2d 986, 987 (9th Cir. 1958) (correspondence courses); *Lee v. Tahash*, 352 F.2d 970, 973-974 (8th Cir. 1965) (prisoners' mail); *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964) (prisoners' mail); *Vida v. Cage*, 385 F.2d 408, 409 (6th Cir. 1967) (communications with other prisoners); *McDonough v. Director of Patuxent*, 429 F.2d 1189, 1192-1193 (4th Cir. 1970) (correspondence with magazine); *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (en banc), *cert. denied*, 405 U.S. 978 (prisoners' mail).

Federal courts have uniformly recognized that an inmate's communications with the outside world may be restricted for rational penal objectives, and that

the inmate's free speech and other First Amendment rights are not violated by such prison regulations. As stated by the Second Circuit, *en banc*, in *Sostre v. McGinnis, supra*, 442 F.2d at 200: "Discipline and prison order are sufficient interests to justify such regulation incidental to the prisoners' speech." *See also, McDonough v. Director of Patuxent, supra*, 429 F.2d 1189, 1193 (4th Cir. 1967) (upholding prohibition of inmate's correspondence with national magazine and others to prevent adverse effect on "institutional control and discipline").

The decision of appellants to bar inmates from granting individual interviews to the press is based upon their determination that such a rule is necessary to maintain the discipline, custody and control of California prisons, and such restriction on individual interviews constitutes an appropriate exercise of their broad regulatory powers. As the Ninth Circuit declared in *Smith v. Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969):

> "It is . . . settled . . . that correctional authorities have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's consitutional rights."

The California Department of Corrections permits the written communication of inmate grievances, complaints and stories to the press and this system continues to give inmates reasonable access to the press. It also permits special purpose visits with publishers.

The restriction of one particular means of communication, namely, individual face-to-face interviews with news representatives, does not abridge the freedom of speech or other First Amendment rights of inmates. *Seale v. Manson*, 326 F.Supp. 1375, 1379 (D.Conn. 1971). In *Smith v. Bounds*, Civ. No. 2914 (E.D.No.Car., opinion dated March 14, 1972), the district court sustained a state prison rule barring inmate interviews with the press, noting (opinion pp. 4-5):

> "In light of the mail regulations of the North Carolina Department of Corrections, it appears that inmates have been provided with sufficient opportunity to correspond with the members of the media and to present their views to the public. In the light of such opportunity, it is not necessary that personal interviews must also be permitted."

Communications between prisoners and the press are not barred by Section 415.071; it prohibits only direct individual press interviews with particular inmates. In view of the need to maintain prison discipline and order, this narrow restriction is not a constitutionally prohibited abridgement of First Amendment rights. See *Cox v. Louisiana*, 379 U.S. 559, 566 (1965), where this Court sustained a state's total ban on picketing near a courthouse when that ban expressed a legislative judgment—comparable to the judgment of prison officials in the instant case—"that such conduct inherently threatens the judicial process." See also *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).

In *Breard v. Alexandria*, 341 U.S. 622, 644 (1951), this Court held that free speech and free press were not "abridged" by an ordinance barring door to door soliciting notwithstanding a publisher's claim of a "right to distribute publications in the precise way that those soliciting for him think brings the best result." Cf. *Johnson v. Avery*, 393 U.S. 483 (1969) (recognizing that an appropriate system of alternative assistance to inmates would justify prison rules barring inmates from acting as writ-writers). *See also Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972), where this Court upheld a ban against distribution of handbills in the interior mall area of a large privately owned shopping center, noting that, "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."

Because California does not allow inmates to demand that prison authorities give them face-to-face meetings with the press and to conduct such press conferences, the inmates are not deprived of a federal constitutional right.

CONCLUSION

For the reasons stated above, substantial questions under the Constitution are presented in this case. Jurisdiction should be noted.

Dated, November 7, 1973.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,
EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—
Criminal Division,
DORIS H. MAIER,
Assistant Attorney General—Writs Section,
ROBERT R. GRANUCCI,
Deputy Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,

Attorneys for Appellants.

(Appendices Follow)

Appendix A

In the United States District Court
For the Northern District of California

No. C-71-2150 SW

Booker T. Hillery, Jr., et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed August 16, 1973]

MEMORANDUM OF OPINION

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS District Judges:

WILLIAMS, District Judge:

At issue here is the constitutionality of §415.071 of the California Department of Corrections Manual, which provides:

> "Press and other media interviews with specific individual inmates will not be permitted."

I.

Plaintiffs seek injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdic-

tion is conferred upon this court under Title 28 U.S.C. §§1343(3), 1343(4) and 2201.

II.

Plaintiffs Hillery, Spain, Bly and Guile are prisoners at San Quentin State Penitentiary. Editors of *Earth Magazine* wish to interview Hillery. Plaintiffs Pell, Sebal, and Jacobs are, respectively, free lance, newspaper, and television journalists, each of whom wishes to interview one of the three other inmate plaintiffs. Each of the inmate plaintiffs has affirmatively consented to an interview; each request was denied by the Warden on the basis of §415.071. None of the prisoner plaintiffs has been alleged by the defendants to have presented disciplinary problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks.

Defendant Procunier is the Director of the State Department of Corrections. Defendant Nelson is the Warden of San Quentin; defendants Park and O'Brien are Associate Wardens.

III.

This case has its humble origins in a complaint drafted by a lay prisoner serving time at San Quentin. Shortly after the action was filed the court appointed counsel and the complaint was amended in March 1972 to add several other prisoners and media representatives as plaintiffs. The State filed a motion to dismiss for failure to state a claim upon which relief can be granted. The matter was thoroughly

briefed and the court, on September 29, 1972, preliminarily enjoined the enforcement of §415.071 and ordered defendants to submit proposed revisions to the regulations comporting to the standards set forth in the court's memorandum of decision. The State immediately moved for vacation of the order for lack of jurisdiction, arguing, for the first time since the initiation of the lawsuit, that since the regulation in question was applied by the Department of Corrections uniformly throughout the entire state penal system, the matter must be adjudicated by a three-judge court. Title 28 U.S.C. §2281; *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969).[1]

Plaintiffs conceded that given the scope of application of §415.071 the injunction was invalid. They urged the court to grant a temporary restraining order pending a final disposition by the three-judge panel. Upon affidavits submitted on behalf of the plaintiffs the court found that plaintiffs would suffer irreparable harm if the relief were not granted and issued the temporary restraining order under the

[1]The litigation had proceeded for almost a year with the parties' and the court's attention focused on the interview practice at San Quentin, where all of the inmate plaintiffs are detained, the interviews sought by the media plaintiffs were to take place, and all the defendants, save Mr. Procunier, were employed. The State, in its moving papers, explained that it did not feel obliged to bring to the attention of the court the statewide nature of the regulation or the jurisdictional point beforehand because it was of the opinion that the issue presented in the lawsuit was insubstantial—a somewhat curious appraisal given the court's obvious concern over the constitutional questions presented by the complaint, manifested, in part, by appointment of counsel for plaintiffs.

same terms as provided in the original injunction. Title 28 U.S.C. §2284(3).

Interim regulations were formulated by the prison officials and implemented in November 1973. None of the sought-after interviews took place, however, and plaintiffs subsequently moved the court to hold defendants in contempt for failure to comply with the order. Defendants moved the order be dissolved. Both motions were denied in light of the impending hearing by this court.

The panel convened February 22 to determine the constitutionality of §415.071 as originally worded. The instant ruling is based on the arguments and testimony offered on that date and the memoranda of law and affidavits submitted by the parties.

IV.

Prior to the implementation of §415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960s such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon

of the "prison celebrity" or "big wheel"—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the "celebrity" over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison.

It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 §415.071 was adopted to mitigate the problem.

The regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population.[2] Thus, media representatives are able to interview an inmate, but unable to select a particular inmate. Similarly, a prisoner who happens to be randomly selected can express himself personally to the newsman or journalist, but cannot initiate an interview himself.[3]

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[2]It is not clear whether selection is made from all segments of the population or whether it is limited to those sections where visitors otherwise have access.

[3]Prisoners engaged in writing for publications are authorized to meet with their publishers' representatives under a separate regulation covering *business* activities of prisoners.

V.

The media plaintiffs herein and amicus curiae[4] argue that §415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees. It has been made clear in recent decisions by the Supreme Court that the press enjoys no greater right to access to news sources than the average citizen. In *Branzburg v. Hayes,* 408 U.S. 665 (1971) the Court held that newsmen were not immune to grand jury solicitation of or information derived from the newsman's confidential sources. While the facts of that case are substantially different than those presented here, the Court unequivocally dismissed any notion that the First Amendment bestowed upon newsmen special news-gathering privileges. Reviewing past decisions on the subject[5] the Court observed:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684.

As in *Branzburg,* the present case ". . . involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." 408 U.S. at 681.

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[4]American Civil Liberties Union.

[5]*Inter alia, Zemel v. Rusk,* 381 U.S. 1 (1965); *Shephard v. Maxwell,* 384 U.S. 333 (1966).

This rationale was followed by the Ninth Circuit in the recent decision in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker,* Civ. No. 72-2330 (June 7, 1973). In that case media plaintiffs and prisoner intervenors challenged a regulation implemented at McNeil Island Federal Penitentiary which prohibited press interviews with willing prisoners. With respect to the First Amendment claims of the media representatives, the court held that under *Zemel v. Rusk, supra,* the "'. . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information'" (Slip opinion at 7), and that the "disruptive influences" at McNeil "outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews." Slip opinion at 7.

The *Seattle-Tacoma* ruling with respect to the media claims controls here. We note in passing, however, that cases cited by plaintiffs emanating from other jurisdictions apparently arriving at an opposite conclusion are distinguishable. In *Washington Post v. Kleindienst,* Civ. 467-72 (D.D.C. April 9, 1972), 40 U.S.L.W. 2683[6] for example, the regulation held un-

[6]In its first Washington Post rulings (hereinafter "Washington Post I") the district court enjoined defendants' enforcement of a regulation banning personal interviews between press representatives and inmates. Defendants secured a stay of that ruling by the Supreme Court *Kleindienst v. Washington Post Co.,* 406 U.S. 912 (1972) and appealed the decision to the court of appeals. That court remanded the case to the district court for reconsideration in light of *Branzburg v. Hayes, supra,* and for further evidentiary proceedings to examine, among other issues, the necessity of personal interviews and the legitimacy of the "big wheel" theory. *Washington Post v. Kleindienst,* Civ. No. 72-1362 (D.C. Cir., September 6, 1972). The district court held further

constitutional barred *all* interviews with inmates at federal penitentiaries in Connecticut and Pennsylvania. The court held that "[a] continuing flat ban against press interviews of any prisoner, at any time, in any institution, is on its face arbitrary." *Washington Post I* at p. 5. In that context, it is apparent the press was not being granted a *special* right of access to prisoners, but simply *some* access. Even under §415.071 as it stood before today's ruling the press was given the freedom to enter the California institutions and interview at random, and it is the conclusion of this court that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates.

VI.

We turn next to the prisoners' rights as they are affected by §415.071. Case law dealing with the constitutionality of prison regulations has proliferated in recent years. From those decisions the court discerns three axioms within whose bounds the current analysis must take place. 1) It is clear that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal

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hearings and issued a Supplemental Memorandum, confirming its earlier rulings and specifically finding that personal interviews are essential to the exercise of both the prisoners' and medias' First Amendment rights, that the "big wheel" theory was unsubstantiated and that *Branzburg* was inapplicable. *Washington Post Co. v. Kleindienst,* Civ. 467-72 (D.D.C. December 19, 1972) (hereinafter "Washington Post II").

system." *Price v. Johnston,* 334 U.S. 266 (1948)[7] 2) Further, prison officials are properly given a great degree of discretion in the administration of penal institutions. *Stroud v. Swope,* 187 F.2d 850 (9th Cir. 1951); *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971) and cases cited at 1379. 3) But it is equally clear that a prisoner does not lose all constitutional rights with the slamming of the jailhouse door (*Gilmore v. Lynch,* 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd.* 400 F.2d 1092, *supra; Seale v. Manson, supra,* at 1379), particularly where the prisoner's First Amendment rights are imperiled. *Nolan v. Fitzpatrick,* 326 F.Supp. 209 (D. Mass. 1971), *reversed on other grounds,* 451 F.2d 545 (1st Cir. 1971), *Burnham v. Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972), *Washington Post Co. v. Kleindienst I, supra.*

That §415.071 abridges, to some degree, plaintiffs' freedom of expression is certain. But even in the "outside world" certain limitations on speech are constitutionally permissible. See, *Kovacs v. Cooper,* 336 U.S. 77 (1949). In determining whether this section is unconstitutional the court must first discern and then balance the prisoners' interests against those of the State.

Defendants argue that plaintiffs' First Amendment rights are sufficiently protected by the press regulation as it stands, in that *written* communications to the press remain unobstructed and personal interviews are permitted, albeit on the random basis described above.

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[7]Holding, *inter alia,* a prisoner is not entitled to personally appear at the hearing of his habeas corpus petition.

But the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say may, with bad luck, never be able to say it effectively. The court is of the opinion that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. Other courts have come to the same conclusion. In *Burnham v. Oswald, supra,* the court dealt with facts almost identical to those presented here. There, inmates at Attica State Prison and newsmen challenged prison regulations that were adopted shortly after the riot of September 9-13, 1971. The regulations permitted press interviews of inmates at the discretion of the Superintendent, who was authorized to deny a request if he determined it would adversely affect the "integrity" of the institution. "Integrity" was left undefined by the regulations. The court held that the regulations granted the Superintendent too broad a discretion in his determination of whether an interview could be held.

> "The court holds that an interview with a consenting inmate must be permitted unless it is determined that to hold the interview would present a clear and present danger of breach of the security, discipline or orderly administration of the institution, [citations omitted], or that the inmate had clearly abused his right of access to the press." 342 F.Supp. at 887.

A significant factor in the court's ruling was the finding that:

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Further, there are many prison situations which can only be explored fully and accurately by a face-to-face interview." 342 F.Supp at 885.[8]

A similar holding was enunciated in *Washington Post Co. v. Kleindienst* where the court was persuaded by the plaintiffs' argument that "[c]ommunication by correspondence is . . . too impersonal and timeconsuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write. Prison tours and related conversations with individuals or groups are . . . too hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation." *Washington Post I*, at p. 5; *Washington Post II*, at p. 1. See, also, Comment, A Prisoner-Press Interview Right, 11 Am.Crim. L.R. 273 (1972). The court fails to see how either of the two virtues of personal interviews—assisting inarticulate inmates express themselves clearly and verifying their stories—can in themselves be objected to by the authorities.

Which brings us to an evaluation of the prison's interest in the preservation of §415.071. It is a fundamental precept of constitutional law that when a state

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[8]But see *Smith v. Bounds*, Civ. No. 2914 (E.D.N.C. March 10, 1972) where it was held that written communication to the press sufficiently preserved the inmates' rights.

restricts a First Amendment right, especially when that restriction is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation. *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Edwards v. South Carolina*, 372 U.S. 229 (1962). This standard applies in the prison context (*Nolan v. Fitzpatrick, supra, Burnham v. Oswald, supra*, at 885, *Fortune Society v. McGinnis*, 319 F.Supp. 904 (S.D.N.Y. 1970), *Seale v. Manson, supra*, Cf. *Martinez v. Procunier*, C-71-543 (N.D. Cal., Feb. 2, 1973) (three-judge court), at pp. 7-8), despite language used by other courts, in dealing with similar cases, that at first glance appears to indicate a lesser standard should be employed. Defendants cite *Carothers v. Follette*, 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both "reasonably . . . and necessarily . . . to the advancement of some justifiable purpose of imprisonment." 314 F.Supp. at 1024. The court believes that this rule is not only consistent with the "compelling interest" test, it is its concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related—"reasonably and necessarily"—to the end sought.

To the extent that *Carothers* can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it

can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who have abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of "clear and present danger" in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably "compelling state interests" (See *Carothers, supra*, at 1024), regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights.

Turning to the instant regulation, the state has offered four grounds upon which it attempts to defend §415.071. None are sufficiently substantiated by fact to sustain the defense.

A.

Administrative Burden

The state anticipates that too wide an access by the press to inmates will result in an intolerable demand on facilities and man-hours. Defendants point to one history in which a prisoner was interviewed sixty-six times in a six-month period. On closer examination, however, this "example" was not only revealed to be a clear exception to the then prevailing practice but appears to have been totally media-initiated. In fact, the number of requests *by prisoners* for press interviews was minimal, as indicated in Warden Nelson's Answers to Interrogatories (filed April 10, 1972):

> "4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media?"
>
> * * *
>
> "A: We have no record of this information. *Requests by prisoners for interviews with media are rare, and none are recalled.*" (Emphasis added).

Additionally, the prison maintained no records as to the number of interviews initiated by media personnel although, presumably, such requests were somewhat more frequent. And insofar as the prisoner's right to interview is concerned, the Warden's response to Interrogatory #4 dispels any notion that prisoner-requested interviews have presented an extraordinary administrative burden. In short, the present regulation attempts to obviate an administrative problem that does not exist, and is therefore neither reasonably nor necessarily related to a legitimate state interest.

By holding that the State has made an insufficient factual showing of administrative burden, the court does not imply that reasonable limitations as to the time, place, and manner of such interviews cannot be imposed. On the contrary, it is obvious that regulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible. See *Seale v. Manson, supra*, at 1383.

B.

Security

Much of the State's argument with respect to the security factor of §415.071 hangs on the "big wheel" theory discussed in Subparagraph D *infra*. The court takes the defendants to argue, additionally, that the mere presence of large number of newsmen endangers the security of the prisons. It might first be noted that newsmen ". . . are not inherently security risks." *Nolan v. Fitzpatrick, supra*, at 213. And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at the hearing that "hundreds" of private citizens visit California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past[9]; and they have conspicuously failed even to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

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[9]The events of August 21, described above, were allegedly sparked by an inmate being given a weapon by an *attorney*.

Prison security is patently a legitimate concern of the defendants, but §415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it. As mentioned above, the number of interviews may be reasonably limited so as to assure adequate supervision by correctional officers. Likewise, the prisons officials may require interviews to submit to reasonable searches for contraband, escape plans, or weapons as a precondition to the interview. Finally, if the authorities have good cause to believe that a *particular* interview would pose a clear and present danger to prison security, it may be denied.

C.

Rehabilitation

The State offered little more than vague speculation as to how §415.071 advances the rehabilitative programs in California prisons and has thus failed to carry its burden of justifying the section on this ground.

D.

The "Big Wheel" Theory

Defendants' principal argument in defense of §415.071 rests on the "Big Wheel" or "celebrity" theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates. This understandably would have several undesirable effects. The elevation of individual prison-

ers to "celebrity" status is detrimental to the Department's disciplinary efforts, which are founded on the policy of treating all prisoners equally, giving no single prisoner specific privileges with which he might use to obtain an advantage over others. When an individual prisoner achieves a sense of special status he is able, defendants contend, to induce other inmates to combine and engage in behavior they otherwise would not exhibit. When two or more rival "big wheels" rise to power, a situation not unlike street gang warfare can result, leading to large scale intimidation, coercion and violence.

The spectre of such a state of affairs is indeed alarming. And this court entertains no doubt that violence exists in correctional institutions in California or that the Department's task of reducing violence is an exceedingly difficult one. The question here, however, is whether §415.071 is reasonably and necessarily related to that task, and the court must conclude that the "big wheel" theory, in the end, has been shown by defendants, *in this particular case*, to be little more than that—a theory. The events out of which §415.071 emanated and by which the Department has attempted to justify the rule—the August 21 incident—serve to illustrate the inapplicability of the theory in this case. One of the prisoners who was killed that day had been interviewed sixty-six times in a six-month period and had published a book composed of letters he had written to members of his family and his attorney which, in substantial part, were critical of society in general and prison administration in

particular. Mr. Guthrie described the prisoner as a "big wheel" and stated he believed the August 21 violence arose, in part, out of the theretofore liberal interview policy. However, when questioned further he admitted that the prisoner has in fact only a limited reputation outside prison and had not achieved "celebrity" status within it prior to August 21. Such status was attained only *after* his death. Mr. Guthrie also testified that between 1970 and the date of the hearing ten professional employees and twenty inmates were murdered in California correctional institutions and that in his opinion this violence can be attributed to the liberal interview policy and the influence of the "big wheels." But when asked to explain the nature of the connection between interviews and the violence neither Mr. Guthrie in his testimony, nor defense counsel in his argument, nor Mr. Procunier in his affidavit, could specify facts showing a direct relationship between the two.

Seattle-Tacoma Newspaper Guild, Local #82 v. Parker, supra, is distinguishable with respect to this issue on two grounds. First, the evidence in Seattle-Tacoma persuasively illustrated that the prison officials had made a "considerable study" of the interview practice and had "concluded that the ban on interviews is necessary to maintain the discipline, custody, and control of the prison." (Slip opinion at 5). As related above, no such showing was made in the present case; on the contrary, defendants' testimony compels a finding that no correlation between press interviews and prison disturbance exists. Secondly,

the *Seattle-Tacoma* case dealt with a regulation applicable only to McNeil Island Penitentiary, a maximum security institution designated for detention of selected prisoners who present serious disciplinary and security problems. (Slip opinion at 4). The regulations had been promulgated on the heels of a riot. Here, the challenged regulations are applied at *all* California state penal institutions, from maximum security prisons to work farms, without regard to the various safety and disciplinary characteristics within the system. On this ground alone the regulation is unconstitutionally overbroad.

Seale v. Manson, supra, cited by defendants in support of the theory is also inapposite. There the plaintiff was being held at a Connecticut state prison without bail on serious criminal charges. He challenged a regulation that expressly *permitted* press interviews with specific inmates, but required prior approval by the Warden. On two occasions reporters were denied access to Seale. The court held, and we agree, that the defendants had a legitimate concern in preventing a prisoner from becoming a "wheel" in the institution and that *limiting* (not, as here, totally excluding) interviews with specific inmates was a permissible means by which to achieve that goal. The court notes that in *Seale* it appears that plaintiff did not disclaim his reputation as a "wheel." In the present case it is not alleged that any of the named plaintiffs have shown a desire to become a celebrity. Mr. Guthrie stated that at the present time he is unable to name a single celebrity throughout the entire Cali-

fornia correctional system. The unavoidable conclusion is that no matter how plausible the "big wheel" theory, there is no hard evidence that the danger presented by interviews is either clear or present. The regulations flatly prohibiting such interviews are therefore unconstitutional.

VII.

For the reasons above, it is Adjudged, Ordered and Decreed that:

1. Defendants' motion for dismissal as against the media plaintiffs is Granted.

2. The inmate plaintiffs' motion for summary judgment is Granted.

3. Defendants shall within 30 days present to the court proposed regulations comporting to this decision.

4. Defendants shall permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision.

Dated: August 16 '77

United States Circuit Judge

United States District Judge

/s/ Spencer Williams

United States District Judge

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS, District Judges

HAMLIN, Circuit Judge, concurring:

For the reasons expressed in the majority opinion I concur in the holding therein that section 415.071 is not violative of the rights of the news media.

I concur also in the holding in that opinion that said section is violative of the rights of the plaintiff inmates, but I do so on a different basis.

The majority examines the constitutionality of the regulation prohibiting inmates from requesting interviews with the news media under the "compelling interest" test, applicable to First Amendment restrictions in society at large.

However, in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, ... F.2d ..... (9 Cir. June 7, 1973), the Ninth Circuit Court of Appeals eschewed the "compelling interest" test as applied to First Amendment restrictions in the prison context, and substituted therefore the "rational basis" analysis:

> "* * * the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any *rational* and constitutionally acceptable concept of a prison system.' (citation omitted). We find that the interview ban is *reasonable action* within the scope of the wide discretion of the prison administrators, and that it does not violate the prisoners' First Amendment rights." (citation omitted.)

> *Id.*, at ..... (slip opinion at 5-6) (emphasis added.) *See also, O'Malley v. Brierly,* 477 F.2d 785 (3 Cir. 1973); *Morales v. Schmidt,* ..... F.2d ..... (7 Cir. January 17, 1973).

While the specific factual situation in *Seattle-Tacoma* differs from the instant case, it is my conclusion that the *Seattle-Tacoma* rationale is herein controlling.

But even under the broader "rational basis" analysis, the blanket prohibition of inmate interviews with the media must fall. As the majority notes, there is insufficient evidence in the record to substantiate such a complete ban.

The defendants may, of course, refuse to permit specific inmates in specific circumstances from conducting interviews with the media, where legitimate reasons exist.

Appendix B

Evelle J. Younger, Attorney General
of the State of California

Edward A. Hinz, Jr., Chief Assistant
Attorney General—Criminal Division

Doris H. Maier, Assistant Attorney
General—Writs Section

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: 557-1336
Attorneys for Defendants

United States District Court
Northern District of California

No. C-71 2150 SW
(Three-Judge Court)

Booker T. Hillery, Jr., et al.,
Plaintiffs

vs.

Raymond K. Procunier, et al.,
Defendants.

[Filed Sept. 12, 1973]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice Is Hereby Given that Raymond K. Procunier, Louis S. Nelson, James W. L. Park and Jo-

seph O'Brien, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting plaintiffs' motion for summary judgment, entered in this action on August 16, 1973.

This appeal is taken pursuant to Title 28, United States Code section 1253.

Dated: September 12, 1973

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General
Doris H. Maier, Assistant Attorney General-Writs Section
Edward P. O'Brien
Assistant Attorney General
John T. Murphy
Deputy Attorney General

Appendix C

United States Court of Appeals
For the Ninth Circuit

Seattle-Tacoma Newspaper Guild, Local #82, of American Newspaper Guild, Dwight Jarrell and Jessica Mitford, Plaintiffs-Appellants, George Sing Louie, Edward Allen Mead, John Van Veenendaal, and Sterling G. Amos, on behalf of themselves and all other persons similarly situated, Plaintiffs-Intervenors, vs. Jacob J. Parker, Warden, McNeil Island Federal Penitentiary and Norman A. Carlson, Director, United States Bureau of Prisons, Defendants-Appellees.	No. 72-2330

[June 7, 1973]

Appeal from the United States District Court
for the Western District of Washington at Seattle

Before: KOELSCH and WRIGHT, Circuit Judges, and BELLONI,* District Judge.

WRIGHT, Circuit Judge:

This appeal presents essentially one question: Does the First Amendment compel the warden of a federal

*Of the District of Oregon.

penitentiary to permit individual press interviews with prison inmates by representatives of the news media? Two aspects of the First Amendment are involved. Is the warden in violation of (1) the First Amendment rights of his prisoners or (2) the First Amendment right of press access to the news, when he prohibits press interviews with willing prisoners?

Suit was brought by the Guild (one-half of whose members are newspaper reporters) and two individuals, one of them a free-lance writer. Their complaint sought temporary and permanent injunctions enjoining the appellees from denying the plaintiffs

(a) The right to access to McNeil Island Federal Penitentiary,

(b) The right to interview prisoners and strike leaders,

(c) The right to take still and moving pictures inside the prison,

(d) The right to interview McNeil officials and employees, and

(e) The right of access to records and administrative directives at McNeil regarding prisoner treatment and prison life conditions.

There had been disruptions in the nature of a prisoner strike at McNeil in 1971 and emergency measures were taken by prison officials to restore order and to prevent recurrences. Members of the Guild sought to interview strike leaders among the more than 1,200 McNeil prisoners and to take statements from prison officials. Some Guild members went to the island by government vessel, accompanied by pho

tographers. They met with Warden Parker, Daggett's predecessor, and he refused permission for photographs, interviews with others or free access to prison records.

Until the disruptive strike, the policy of the prison had been to provide access to relatives, friends, attorneys, news media, social workers, interested citizens, members of charitable organizations and other visitors, usually at scheduled times. The policy was curtailed during the strike because many prisoners refused to report for regular duties and destroyed government property. Contemporaneously, a group of protesters gathered and demonstrated at the Government pier on the mainland, the terminus for the vessel which transported personnel and supplies to the island. These circumstances caused a deployment of prison forces to preserve order, protect government property and prevent bodily harm.

Intervenors are McNeil prisoners who joined in the suit on their own behalf and on behalf of others similarly situated. They, too, sought injunctive relief from the prison policy of prohibiting press interviews. They claimed the policy violated their First Amendment rights of free speech, free press and the right to petition for redress of grievances.

While the suit was pending, the Bureau of Prisons reviewed its policies concerning access to prisons by press personnel. In February 1972, it issued a revised Policy Statement which defined news media,[1] recog-

[1]"A newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station." (Policy Statement 1220.1A, ¶4a).

nized the right of inmates to have access to the media by correspondence,[2] and provided for other confidential correspondence from inmates.[3]

The Policy Statement further provided encouragement to press representatives to visit institutions for the purpose of reporting on facilities and programs,[4] but with some limitations. Specifically, press interviews with individual inmates were prohibited.[5] It is this prohibition that is now challenged by both the press and the inmates.

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[2]"A representative of the news media may initiate correspondence with a particular inmate. Incoming correspondence from the news media will be inspected solely for contraband, or for content which would incite conduct which is illegal. Rejected correspondence will be returned to the sender, with an explanation. Questions to the inmate may be presented through this correspondence, and the inmate may respond through the Prisoners Mail Box." (Policy Statement 1220.1A, ¶4b(2)).

[3]The prisoners may send confidential messages to:

(1) The United States Courts;
(2) Members of the United States Senate and the House of Representatives;
(3) The Director of the United States Bureau of Prisons;
(4) The Attorney General of the United States;
(5) The President and the Vice President of the United States;
(6) Members of the United States Board of Parole;
(7) The Pardon Attorney;
(8) The Surgeon General, United States Public Health Service;
(9) The Secretaries of the Army, Navy, and Air Force.

Bureau of Prisons Policy Statement, No. 7300.2B.

[4]"Representatives of the press are encouraged to visit Bureau institutions for the purpose of preparing reports about institutional facilities, programs and activities." (Policy Statement 1220.1A, (5)).

[5]"Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." (Policy Statement 1220.1a, ¶4b(6)). (The second sentence above permits only casual conversations held in the course of prison tours.)

Experience in other institutions, said the Bureau of Prisons, led it to conclude that inmate interviews would adversely affect prison discipline and administration.

The Bureau found that interviews had two separate damaging consequences: (1) disciplinary problems increased, following interviews with disruptive or non-cooperative prisoners, who encouraged others to adopt their hostile approach, and (2) prisoners interviewed became celebrities or "big wheels," less subject to constructive rehabilitation. The Bureau believes that all prisoners should receive equal treatment, except for individual physical, mental and moral needs. Defendant Carlson, Bureau Director, supplied the district court with an affidavit on this subject.[6]

In his oral decision, the district court noted that McNeil is a "maximum security" institution, designated for detention of selected prisoners. Its officials face serious disciplinary and security problems because McNeil has few first offenders and many recidivists with multiple convictions of crimes of violence. Finding that the rule against inmate interviews "is calculated to avoid a disruptive influence in the inter-

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[6] "• • • Prisons invariably have inmates drawn from all walks of life, including the rich and the poor, the prominent and the obscure, the celebrated and the unknown. Prison life is intended to provide an equality of living without echelons of strata based upon past civilian life. If publicity or renown were accorded individual prisoners by publicity, favorable or unfavorable, it would violate this principle and create further internal rivalries within the prison and tend to promote special treatment of such persons.

"Limiting interviews would not eliminate and at best could reduce the adverse effect described above because it would still result in allowing special treatment for individuals of renown or who seek publicity. • • •" (Tr. 230, 364)

nal operation" of a federal prison, the court concluded that the Bureau regulation is not unconstitutional or oppressive but is "reasonable and is designed to give the administration of the institution some flexibility to adequately meet their responsibilities."

All parties having moved for summary judgment, the district court granted the motion of appellees and dismissed the action.

THE INMATES

It is axiomatic that prison inmates retain constitutional rights, and that "a prisoner does not shed his first amendment rights at the prison portals." *Brown v. Peyton,* 437 F.2d 1228, 1230 (4th Cir. 1971). However, it is equally clear that ". . . [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948).

As another Court of Appeals has pointed out:

> "Imprisoned felons and inmates of such institutions * * * cannot enjoy many of the liberties, the rights and the privileges of free men. They cannot go abroad or mount the housetops to speak. They are subjected to rigid physical limitations and to disciplinary controls which find no shred of justification in any other context. Even the disciplinary powers of military authorities are not so absolute." *McCloskey v. Maryland,* 337 F.2d 72, 74 (4th Cir. 1964).[7]

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[7] *See also, Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971) (en banc) *McDonough v. Director of Patuxent,* 429 F.2d 1189 (4th Cir. 1970).

The Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison and the safety and rehabilitation of its inmates, and accordingly they must be given wide discretion in formulating rules to govern prison life. In the instant case the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion "lacks support in any rational and constitutionally acceptable concept of a prison system." *Sostre v. McGinnis,* 442 F.2d 172, 199 (2d Cir. 1971) (en banc). We find that the interview ban is reasonable action within the scope of the wide discretion of the prison administrators and that it does not violate the prisoners' First Amendment rights. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969).

In concluding that the institutional concerns override the interest of the individual inmate in talking face to face with a member of the news media, we note that such a deprivation will not allow any real complaint about the treatment of the inmate or the administration of the prison to go unredressed. Prisoners are allowed by Bureau regulation to confer freely with their counsel, to conduct unlimited confidential correspondence, to visit with relatives and friends, to counsel with clergymen of their faith, and most important, to have free access to the courts. This court, as others, gives prompt and careful attention to prisoner peti-

tions[8] alleging violations of civil rights[9] and counsel is appointed to assist the prisoner in those cases where the need therefore is demonstrated.

THE PRESS

Federal prisons are public institutions, and their administration is a matter of concern to all citizens. Decisions recognizing "the paramount public interest in a free flow of information to the people concerning public officials, their servants,"[10] are equally applicable in the realm of prison administration. The importance of the media in providing public information

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[8]Prisoner petitioners drawn *pro se* are also held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519 (1972.

[9]*Haines v. Kerner*, 404 U.S. 519 (1972) (State prisoner appearing *pro se* is entitled to a hearing on his allegations that he suffered injuries while being subjected to confinement without due process.)

Wilwording v. Swenson, 404 U.S. 249 (1971) (State prisoners need not exhaust state remedies before bringing Civil Rights action to challenge living conditions and disciplinary measures.)

Keeton v. Procunier, 468 F.2d 810 (9th Cir. 1972). (State prisoner is entitled to a hearing on his Civil Rights Act claim that state officials ran a kangeroo court inquisition before rescinding his parole recommendation).

McMann v. Wright, 460 F.2d 126 (2d Cir. 1972) (State prisoners are entitled under Civil Rights Act to damages against warden for "barbarous and inhumane" treatment by deputy warden.)

Nosser v. Bradley, 456 F.2d 835 (5th Cir. 1972) (10 CrL 2482) (Allegation of summary arrest and inhumane confinement states cause of action under Civil Rights Act.

[10]*Garrison v. Louisiana*, 379 U.S. 64, 76 (1964). *See also Time, Inc. v. Hill*, 385 U.S. 374 (1967), *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *New York Times Co. v. United States*, 403 U.S. 713 (1971).

about the conduct of these institutions is undisputed. Indeed, it has often been through the zealous efforts of the news media that failures in a particular institution have been exposed.

We are acutely aware of the public's need for information in this area. However, we do not accept the argument that the public interest in having its prisons secure and free from disruptive influences and in the rehabilitation of prisoners is insufficient to outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews.

We have already noted that the regulation in question is rationally related to the achievement of legitimate goals of prison administration. Appellant Newspapers Guild argues that despite the wide discretion allowed administrators in the formulation of rules and regulations governing prisons, there is nonetheless an absolute right to gather news, citing *Branzburg v. Hayes,* 408 U.S. 665 (1972):

> "We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection: without some protection for seeking out the news, freedom of the press could be eviscerated." At 681.

However, ". . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information," *Zemel v. Rusk,* 381 U.S. 1, 17 (1965), and accordingly the issue we must decide is whether the interview ban unduly restricts the flow of information

to the public. In concluding that it does not[11] we again call attention to the Bureau's regulations giving news media extensive access to prison facilities and personnel, as well as the right to unlimited confidential correspondence with inmates. We are convinced that any hampering of the ability of the media to report occasioned by the interview ban is more than justified by the persuasive reasons given for its formulation.

It should be noted, however, that in this suit the interview ban dictated by the regulation is being attacked only insofar as it is applied at McNeil Island Penitentiary, a maximum security institution. Our holding today does not concern the application of the regulation to the wide variety of other institutions employed in the incarceration and rehabilitation of federal offenders.

The order of the district court granting summary judgment is affirmed.

CONCURRING SPECIALLY

KOELSCH, Circuit Judge.

As I read the record, the court below dismissed the actions on Rule 12(b)(6) grounds and did not, as the majority opinion seems to suggest, resort to nor pass

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[11] *See also Smith et al. v. Bounds, et al.* (E.D.N.C. Mar. 10, 1972); *contra, Washington Post, et al. v. Kleindienst, et al.* (D.D.C. unreported memorandum opinion of April 5, 1972, as supplemented by opinion of Dec. 19, 1972). *Cf. Yarish v. Nelson*, 104 Cal.Rptr. 205 (1972), petition for rehearing denied by the California Supreme Court, November 16, 1972.

upon the parties' respective Rule 56 motions for summary judgment.

Had it been necessary for the court to consider the latter motions, then we should reverse, for plaintiffs tendered a number of counter-affidavits setting out facts purporting to support their allegations that the questioned provision of the revised "Policy Statement" of February 11, 1972, violated, and were being applied in a manner that violated, their First Amendment rights. However, upon inspection of those provisions, the conclusion is manifest to me that none of them have, or could have, such an effect. The provisions are narrowly drawn and prohibit specific conduct that would, at least arguably, infringe upon a substantial federal interest in protecting the federal penal system. In short, I am firmly convinced that plaintiffs neither stated, nor could they state, any actionable claim or claims, and that we need not, indeed should not, suggest otherwise.

I concur in the result.